NO. 86-564

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District Carolina

APPELLANTS' REPLY MEMORANDUM

LACY H. THORNBURG
ATTORNEY GENERAL FOR THE
STATE OF NORTH CAROLINA

CATHREINE C. McLAMB
ASSISTANT ATTORNEY GENERAL
LEMUEL W. HINTON
ASSISTANT ATTORNEY GENERAL

N.C. DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4618
ATTORNEYS FOR APPELLANTS

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

PHILLIP J. KIRK, Secretary, North Carolina Department of Human Resources, in his official capacity, *et al.*,

Appellants,

v.

BEATY MAE GILLIARD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District Carolina

APPELLANTS' REPLY MEMORANDUM

The appellees, in their brief supporting their Motion to Affirm in No. 86-564, join with appellants to urge this Court to note probable jurisdiction in the State appellants' direct appeal to this Court under 28 USC § 1252 on the issue presented concerning the constitutionality of an Act of Congress. However, the appellees further request that the Court not consider appellants' second issue on direct appeal because the appellees consider it to be "insubstantial". This categorization of insubstantiality is made even though the question presented by appellant's second issue is whether the lower court entered an order which was in violation of the

Eleventh Amendment to the Constitution of the United States. (Appellant's Jurisdictional Statement, pp. 13-15).

As noted by the appellees in support of their request that this Court not hear arguments on the second issue, the District Court specifically addressed the issue in its opinion and entered an order implementing its decision in an order which appellants' contend is unconstitutional. As this Court has recently stated in ***United States v. Locke***, 471 U.S. 84 (1985), an appeal under 28 USC § 1252 brings to this Court the entire case below, not just the constitutional question under which direct appeal jurisdiction was invoked. ***See also, National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co.***, 470 U.S. 451, n. 21 (1984); ***McLucas v. DeChamplain***, 421 U.S. 21 (1975); ***United States v. Raines***, 361U.S. 17, n. 7 (1960). Since the second issue on this direct appeal was passed upon by the lower court and an implementing order was entered (but later stayed pending appeal, Appellants Jurisdictional Statement, App. E, pages 148-154), this issue is now before this Court under 28 USC § 1252 just as is the first issue on direct appeal. Plenary review should be granted on all issues before this Court.

In their brief supporting their Motion to Affirm, appellees attempt to uphold the correctness of the district court's award of "retroactive benefits" to be paid out of the State Treasury. (***See***, Appellant's Jurisdicational Statement, App. I, Memorandum of Decision A-78). As were the opinions relied upon by the district court in its Memorandum of Decision, the cases cited by appellees in their brief are inapposite. No opinion by this Court in appellees' brief involves the award of monetary retroactive payments from a state treasury. Indeed the opinion in ***Hutto v. Finney***, 437 U.S. 678 (1978), was stressed by appellees as standing for the proposition that "a court's authority to issue a prospective

injunction necessarily includes the power to correct the effects of subsequent violations of such an injunction. (Appellees' brief, page 23). The ***Hutto*** opinion, which involves the award of attorneys fees out of public funds under a specific act, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, in no way can be read to encompass this overly general statement in Appellees' brief. As this Court recently held in ***North Carolina Department of Transportation v. Crest Street Community Council, Inc.***, US _____ (No. 85-7677, November 4, 1986), such an award of attorneys fees is restricted to those actions to enforce one of the civil rights laws listed in 42 U.S.C. § 1988. Furthermore, the ***Hutto*** opinion at pages 689-700 clearly enunciates the distinction between the order of "retroactive" relief from a public fund such as damages or restitution which is barred by the Eleventh Amendment and the imposition of civil penalties. The award of retroactive benefits by the lower court in this case clearly contravenes the standing principle set out in ***Edelman v. Jordan***, 415 U.S. 651 (1974) and is in violation of the Eleventh Amendment to the Constitution of the United States.

The need for plenary review on all issues is indisputable. Indeed, if any summary action should be taken by this court, it should be a summary reversal of the lower court's decision.

Respectfully submitted.

Catherine C. McLamb

Catherine C. McLamb
Counsel for Appellants
Kirk and McCarty
N.C. Department of Justice

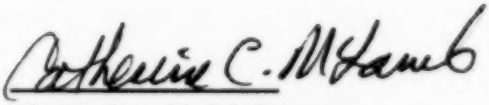
CERTIFICATE OF SERVICE

It is hereby certified that Appellant's Reply Memorandum has been served on all parties required to be served, as listed below, by first class mail, postage prepaid:

Mr. Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Ms. Jane R. Wettach, Esq.
East Central Community Legal Services
Post Office Drawer 1731
Raleigh, North Carolina 27602

This the 12 day of November, 1986.



Catherine C. McLamb
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4618